82-1204

NO.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

WER-COY FABRICATION COMPANY, INC.

-VS-

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 292, AFL-CIO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

WILLIAM L. HOOTH
ANDREW T. BARAN
Business Address:
3001 West Big Beaver
Suite 624
Troy, Michigan 48084
Telephone: (313) 649-4455
COUNSEL FOR PETITIONER

AMERICAN PRINTING COMPANY
1200 WEST FORT STREET, DETROIT, MICHIGAN 48226 — (313) 963-9310

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Wer-Coy Fabrication Company, Inc. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

QUESTIONS PRESENTED

1. Whether a clause in a collective bargaining agreement which creates different and more stringent standards for the termination of union stewards than for the termination of other employees is discriminatory with respect to terms and conditions of employment in violation of sections 8(a)(3) and 8(b)(2) of the National Labor Relations Act, 29 U.S.C. §158(a)(3) and (b)(2)?

2. Whether summary judgment could properly be granted to a union seeking to enforce an arbitration award based on such a clause without a showing of a legitimate and substantial business justification for the clause?

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The Order entered in this case by the United States District Court for the Eastern District of Michigan is reproduced at Appendix p. 1a The Order entered by the Circuit Court of Appeals is reproduced at Appendix p. 3a

JURISDICTION

The Order of the United States Court of Appeals for the Sixth Circuit affirming the Summary Judgment granted by the United States District Court for the Eastern District of Michigan was entered on October 22, 1982. This Petition is filed within 90 days of said Order. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

29 U.S.C. §158(a)(3)

(a) It shall be an unfair labor practice for an employer— . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .

29 U.S.C. §158(b)(2)

(b) It shall be an unfair labor practice for a labor organization or its agents— . . .

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) . . .

STATEMENT OF THE CASE

For a number of years, Sheet Metal Workers International Association, Local Union No. 292 (hereinafter "Local 292") has had a collective bargaining agreement with the Associated Metal Fabricators and Contractors (hereinafter "Association"). In 1979, Wer-Coy Fabrication Company, Inc. (hereinafter "Wer-Coy") became a member of the Association and was bound by the terms of the collective bargaining agreement then in effect between the Association and Local 292.

On August 5, 1980, Oscar Werden, president of Wer-Coy, discharged its union steward. A grievance seeking the reinstatement of the steward was subsequently filed and processed to arbitration. The arbitrator concluded that under Section 5(k) of the collective bargaining agreement between the parties (App. p. 5a) union stewards could be discharged only for just cause, and that Wer-Coy had not had just cause to discharge its steward. He ordered the reinstatement of the steward.

Wer-Coy refused to do this. Local 292 then filed an action under Section 301 of the Labor-Management Relations Act of 1947, in the United States District Court for the Eastern District of Michigan to compel Wer-Coy to abide by the arbitration award. Wer-Coy put forth a number of reasons for its refusal. Among these was its contention that the contract clause upon which the arbitration award was based was illegal, because it discriminated unfairly in favor of union membership in contravention of the Labor-Management Relations Act. The clause in question provided that union stewards could be discharged only for just cause; other employees were not provided with any such protection and could be discharged at will. The District Court rejected Wer-Coy's arguments. It conceded that the question of the legality of the contract clause was troublesome, but stated that presumption in favor of an arbitration award should be indulged (App. p. 7a) Accordingly, it granted Local 292's motion for summary judgment for enforcement of the award.

Wer-Coy timely filed an appeal of the District Court's decision with the United States Court of Appeals for the Sixth Circuit. The Court of Appeals concluded that the contractual provision challenged by Wer-Coy was designed only to protect employees from discrimination because of their assumption of responsiblity in the union. It therefore affirmed the judgment of the district court below.

REASONS FOR THE ALLOWANCE OF THE WRIT

THE RULINGS OF THE COURTS BELOW IN THE INSTANT CASE, THAT A CLAUSE IN A COLLECTIVE BARGAINING AGREEMENT WHICH CREATES A DIFFERENT AND MORE RIGOROUS STANDARD FOR THE TERMINATION OF UNION STEWARDS THAN FOR THE TERMINATION OF OTHER EMPLOYEES IS NOT ILLEGAL AND IS A PROPER BASIS FOR AN ARBITRATION AWARD, IS CONTRARY TO THE REASONING OF OTHER COURTS AND THE NATIONAL LABOR RELATIONS BOARD AND PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE RESOLVED BY THIS COURT.

1. The disputed contract clause is illegal and cannot form the basis for a valid arbitration award.

A. The requirements of the Labor-Management Relations Act.

The Labor-Management Relations Act prohibits discrimination by employers with respect to terms and conditions of employment for the purpose of encouraging membership in a union, 29 U.S.C. § 158(a)(3). Indeed, any such action would be an unfair labor practice, 29 U.S.C. § 158(b)(2). This Court has ruled that discrimination which encourages employees to be "good" union members is violative of the law. *Radio Officers Union* v *NLRB*, 347 U.S. 17 (1954).

> It is well settled that "membership" as used in Section 8(a)(3) refers not only to the employee's basic decisions as to whether to join or remain in a union, but also to his decisions as to the level of his participation in the union and union activities . . . Thus, actions encouraging or discouraging service as a union steward clearly fall within the scope of Section 8(a)(3). *Teamsters, Local 20* v *NLRB*, 610 F2d 991, 993 (D.C. Cir. 1979).

B. Prior Decision of the National Labor Relations Board and Other Courts of Appeal.

Of course, the National Labor Relations Board has primary responsibility for interpreting and applying the provisions of the Labor-Management Relations Act. The Board has considered and ruled on the legality of various kinds of contract clauses providing special benefits to union stewards or other officials. Its most important ruling in this area was in the case of *Dairylea Cooperative, Inc.*, 219 NLRB 656 (1975), *enfd.*, 531 F2d 1162 (2d Cir. 1976).

In *Dairylea*, the Board had to decide whether a contract clause which gave union stewards top seniority with respect to all contractual benefits where seniority was a consideration was legal. The Board concluded:

> It has not, however, been established in this case or elsewhere that superseniority going beyond layoff and recall serves any aim other than the impermissable one of giving union stewards special economic or other on-the-job benefits solely because of their position in the Union . . . we do find that superseniority clauses which are not on their face limited to layoff and recall are presumptively unlawful, and that the burden of rebutting that presumption (i.e. establishing justification) rests on the shoulders of the party asserting their legality. 219 NLRB at 658.

Later Board rulings have made clear that the *Dairylea* rationale cannot be restricted to only those clauses dealing

with seniority rather than other types of contractually provided benefits. In *Plumbers, Local 119*, 255 NLRB 1056 (1981), for instance, the Board found the enforcement of a provision granted stewards an additional payment of 75 cents per hour to be an unfair labor practice. Because the contract benefit was available only to stewards, it was, in effect, an infringement on the rights of other employees.

Various courts of appeal have affirmed the Board's reasoning in *Dairylea*. *Dairylea* itself was enforced in *NLRB* v *Teamsters, Local 338*, 531 F2d 1132 (2d Cir. 1976). In that case, the Second Circuit noted that the policy of Section 8(a)(3) and 8(b)(2) was to insulate the jobs of employees from their organizational rights, and that the union could provide other incentives if such were needed to attract and retain stewards. *See also NLRB* v *American Can Co.*, 658 F2d 746 (10th Cir. 1981); *Teamsters, Local 20* v *NLRB*, *supra*. Courts have stressed that to justify a clause not limited to superseniority for purposes of layoff and recall, a union must make a specific showing of both a legitimate and a substantial interest in such a clause. *Paintsmiths, Inc.* v *NLRB*, 620 F2d 1326 (8th Cir. 1980).

The most relevant case with regard to the issues raised in the instant proceeding is *Perma-Line Corp.* v *Painters, Local 230*, 639 F2d 890 (2d Cir. 1980). In *Perma-Line*, the union had filed a grievance over the discharge of a steward. The contract provided that stewards could not be discharged without the consent of the union; other employees were not provided with similar protection. During arbitration, the employer argued that this provision did not cover discharges for cause, but the arbitrator nonetheless ordered the steward's reinstatement. The employer then petitioned the district court to set aside the arbitration award, contending that the arbitrator's decision was improper and that the clause upon which it was based was presumptively illegal under Sections 8(a)(3) and 8(b)(2) as a glorified superseniority clause. The court agreed that the arbitrator had incorrectly interpreted the collective bargaining agreement, but

felt bound to defer to the arbitration award. It also ruled that the disputed clause was not plaintly contrary to federal labor law.

On appeal, the Second Circuit reversed on both of these issues. It began its review by noting that a provision of a collective bargaining agreement which violated the National Labor Relations Act was both void and unenforceable and could not properly be the basis of an arbitration award, regardless of the arbitrator's decision. Because of this, when an award was based on such a clause, a reviewing court had the duty to step in and vacate the award as contrary to public policy. Supporting authority from four other circuits for this proposition was cited.

Turning to the contract clause at issue, the court found that because of the preferential treatment it granted stewards with regard to discharge, the clause encouraged employees to be "good" union members. "Such protection is the ultimate benefit a union can give to a union member". 639 F2d at 896. The court concluded that this was a "superseniority clause *ne plus ultra*" *Id*, and presumptively illegal absent a showing by the union which justified the provision.

C. The contract clause challenged by Wer-Coy.

It is clear that the clause challenged by Wer-Coy is a presumptively illegal superseniority clause under the criteria set out by *Dairylea* and its progeny. The clause does not even address the issues of layoff and recall, but simply creates one standard for the treatment of stewards in discharge situations and a different, lower standard for all other employees. It thus confers a direct job-related benefit which is available only to stewards and is obviously dependent upon union status. This is precisely the sort of inducement which is suspect under federal law and the decisions discussed above. Under *Dairylea* and *Perma-Line* there is therefore a burden placed on the union to justify this clause by showing a legitimate and substantial justification for it.

D. The decisions below with respect to the contested clause.

Although the issue was timely raised, the district court below did not require the union to and the union did not make any showing of a legitimate and substantial interest in enforcing the clause requiring just cause for the discharge of union stewards only, as is required under *Dairylea*. Therefore, the union never rebutted the presumptive illegality of a clause which conferred direct job-related benefits beyond superseniority for purposes of layoff and recall upon its stewards. Rather than applying the *Dairylea* standards, the court simply indicated that it would defer to the arbitration award (App. p. 7a)—an erroneous course also followed by the district court in *Perma-Line*. As established in the Second Circuit's decision in *Perma-Line* and the cases cited therein, such deference to the arbitration process is proper only if the provisions upon which the decision is based do not contravene federal law or public policy. When this is not the case, courts may not abdicate their responsibility and, by default, ratify the enforcement of illegal contract clauses. This principle would have been obvious had the clause in question discriminated on the basis of race or sex. It is equally applicable when the discrimination is based on union status.

Rather than ordering this matter to be returned to the district court level to require Local 292 to justify this presumptively illegal clause, the Sixth Circuit apparently simply reached an independent conclusion that the clause was "a mutually satisfactory means of protecting an employee from discrimination because of his assumption of responsibility in the Union." App. p. 4a Even had there been an adequate record developed below and an actual showing of justification made by the union, this would have been error, since there existed an issue of law, properly to be resolved by the district court. *See* discussion *infra*. However, in fact there had been no showing made before the district court, nor, of course, had evidence on this issue been introduced before the Court of Appeals. In addition, it

does not appear from a reading of the decision that any burden was placed on Local 292 to justify the contested clause. This contrasts sharply with the approach of the Second Circuit in *Perma-Line*, where the case was remanded to allow the development of an adequate record.

By ruling as it did, the Sixth Circuit disregarded NLRB precedent and split with other circuits on an important issue of federal labor law. It allowed a presumptively illegal contract clause to form the basis of an arbitration award without requiring any justification of the clause and indeed without the presentation of testimony or other evidence as to the necessity or interpretation of the clause. The ruling of the Sixth Circuit was erroneous, and this Court should accept this writ to resolve the issues of federal labor law raised by it.

2. Summary judgment in favor of the union could not properly be granted until the presumptive illegality of the clause was rebutted.

A. Proper standard for summary judgment.

The proper standard for the granting of a Motion for Summary Judgment is set forth in Rule 56 of the Federal Rules of Civil Procedure. The Motion is to be granted if, from the record it appears "that there is no genuine issue as to any material fact and that the moving party is entitled to a Judgment as a matter of law." In ruling on such a Motion, the court is to "look at the record on Summary Judgment in the light most favorable to . . . the party opposing the motion." *Poller* v *Columbia Broadcasting System, Inc.*, 368 US 464, 473 (1962); *Fitzke* v *Shappell*, 468 F2d 1072 (6th Cir. 1972).

The party opposing the motion is to have his allegations taken as true and to receive the benefit of the doubt when his assertions conflict with those of the movant. *Bosely* v *City of Euclid*, 496 F2d 193 (6th Cir. 1974) (quoting 10 Wright & Miller, *Federal Practice and Procedure*, §2716 at 430-32) "[T]he papers supporting the movant are closely

scrutinized, whereas the opponent's are indulgently treated". *Bohn Aluminum and Brass Corp.* v *Storm King Corp.*, 303 F2d 425, 427 (6th Cir. 1962) (quoting 6 *Moore's Federal Practice* Par. 56-15 (3), pp. 2123-2126) The facts supporting the motion are to establish the non-existence of any genuine issue as to a material fact and the movant must also show his entitlement to a judgment as a matter of law. *Bloomgarden* v *Coyer*, 479 F2d 201 (D.C. Cir. 1973). The court has the power to look at any evidential source to determine whether such an issue exists. *Mintz* v *Mathers Fund, Inc.*, 463 F2d 495 (7th Cir. 1972).

B. Summary judgment in this matter was improper, because the moving party was not entitled to a judgment as a matter of law.

As indicated above, at the time summary judgment is granted, the moving party must have established that it is entitled to the judgment as a matter of law. Therefore, under established precedent, one of the prerequisites would have been the establishment of a legitimate and substantial interest in the maintenance and enforcement of the presumptively illegal contract clause challenged by Wer-Coy. Of course, as has been described, this was never done because it was not required by the district court, which chose to simply defer to the arbitration award.

The court is empowered to look to all sources to insure there are no obstacles to a summary judgment. In this case, the dispute as to the validity of the clause was already a part of the record before the court. The dispute raised a significant and material legal issue which had to be resolved before summary judgment could properly be granted. *See Perma-Line, supra.* In light of the presumptive illegality of the disputed clause, mere deferrence to the arbitration opinion (which had not even addressed this issue) was improper. Because this presumptive illegality was never rebutted by Local 292, it could not have been entitled to judgment in its favor as a matter of law. For this reason, the decision of the district court as affirmed by the Sixth Circuit was erroneous and should be reversed.

CONCLUSION

The decisions of the courts below in this proceeding are erroneous in at least two respects. First, mere deferral to the arbitration process is improper where the contract clause upon which the decision was based is contrary to federal labor law or established public policy. A clause which confers job related benefits to union stewards beyond superseniority for purposes of layoff and recall is presumptively illegal under the National Labor Relations Act. Where, as here, the arbitration decision which is sought to be enforced is presumptively illegal, the party seeking enforcement has to establish a legitimate and substantial interest in the clause to rebut the presumption. Accordingly, the courts below erred in not requiring Local 292 to rebut the presumption of illegality but rather simply accepting the arbitration award or, in the case of the court of appeals, making an improper decision as to the merits of the clause without any basis for such a ruling in the record of the case.

The error as to the applicable standard to use in determining whether to enforce the arbitration award was compounded by the granting of a summary judgment at a time when the moving party was not entitled to a judgment as a matter of law, because it had not established the legality of the contract clause underlying the arbitration decision.

The rulings of the courts below contradict or ignore relevant precedent from the National Labor Relations Board and other courts of appeal. They raise significant issues of federal labor law. For these reasons, the petitioner asks that this Court grant its writ.

Respectfully submitted,

COX, HOOTH & CURLEY
William L. Hooth (P 15113)
By: Andrew T. Baran (P 31883)
Business Address:
3001 W. Big Beaver Road
Suite 624
Troy, Michigan 48084
Telephone: (313) 649-4455